

BOARD OF APPEALS  
for  
MONTGOMERY COUNTY

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850

(240) 777-6600

**Case No. S-2447**

**PETITION OF AT&T WIRELESS SERVICES**

Resolution Reaffirming Dismissal of Petition  
Oral Argument Held December 5, 2001  
(Effective Date of Resolution: January 23, 2002)

Case S-2447 is an application for a special exception pursuant to § 59-G-2.43 (Public Utility Building, Public Utility Structures and Telecommunications Facilities) of the Montgomery County Zoning Ordinance to permit a telecommunications facility which would include a 130 foot monopole, 9 panel antennas and a 12 by 28 foot equipment building.

The subject property is Parcel 111, located at 8630 Brink Road, Gaithersburg, Maryland, in the RE-2 zone.

On October 3, 2001, a public hearing was convened on the above captioned special exception. At the hearing, Norman Knopf, Esquire, on behalf of David and Cathy Hubbard, adjoining property owners in opposition to the petition, moved to dismiss the petition. That motion was granted and a resolution dismissing the petition was issued with an effective date of November 26, 2001.

On October 23, 2001, Edward L. Donohue, Esquire, on behalf of the petitioner, filed a motion for reconsideration of the Board's action dismissing the petition. Mr. Knopf filed a response on November 8, 2001.

On December 5, 2001, a hearing was held on the motion for reconsideration, pursuant to the Board's authority under Paragraph 10 of the Board's Rules of Procedure. Edward L. Donohue, Esquire, appeared on behalf of petitioner AT&T Wireless and Norman Knopf, Esquire, appeared on behalf of David and Cathy Hubbard, adjoining property owners in opposition. Martin Klauber, Esquire, Office of the People's Counsel, also appeared.

## **EVIDENCE PRESENTED TO THE BOARD**

1. Patricia and J. F. Burrows (the "Burrows") are the owners of Parcel 111 at 8630 Brink Road. The parcel is 25.04 acres in size. The Burrows and the petitioner have entered into a Lease Agreement for a 50 by 50 foot area on which petitioner proposes to construct the 130 foot monopole and equipment building. (See Exhibit Nos. 5, 9, and 27(b)).
2. The Burrows are not co-petitioners with AT&T Wireless Services.
3. The 50 by 50 foot leased area is less than the two acre minimum lot size required for a residential structure in an RE-2 zone. See, Montgomery County Zoning Ordinance, Section 59-C-1.322(a).
4. At the hearing held December 5, 2001, petitioner offered into evidence a letter from the Burrows to Mr. Donohue, petitioner's counsel, stating that they authorized the prosecution of the petition for a special exception "on behalf of your clients" and "agreed to the filing of a Special Exception Application" by AT&T Wireless. (Exhibit 54(b)).

## **FINDINGS OF THE BOARD**

### **MINIMUM LOT SIZE**

The petitioner first argues that the Montgomery County Zoning Ordinance does not contain any lot size requirements that relate to the proposed use of the property. The Board disagrees with this assertion. Section 59-G-2.43(j)(1) provides:

The minimum parcel or lot area must be sufficient to accommodate the location requirements for the support structure under Paragraph 2, excluding the antennas, but not less than the lot area required by the zone . . . . (emphasis added).

The Board interprets this section to mean that petitioner's proposal must be on a lot or parcel large enough to meet the applicable minimum parcel or lot area required in that zone. Section 59-C-1.322(a) of the Zoning Ordinance provides that the minimum net lot area for a one family detached dwelling is 87,120 feet or two acres in an RE-2 zone. The Zoning Ordinance does not provide for an alternate minimum lot area for any other type of building or structure in the RE-2 zone. Further, no specific minimum lot area is identified for a telecommunications tower in that section.

Petitioner supports its argument citing the case of *Christopher O'Flinn v. Bell Atlantic Nynex Mobile*, an unreported decision in the Court of Special

Appeals, Case No. 31, September Term, 1999, filed January 20, 2000. The *O'Flinn* case involved a special exception for a telecommunications facility in Montgomery County. Petitioner directs the Board to a statement by the Court of Special Appeals at Page 12 of the *O'Flinn* opinion that "no minimum lot area is required for a telecommunications facility."

In the *O'Flinn* case, the issue presented was whether two special exceptions could exist on the same property. The property was located in an RE-2 zone and exceeded two acres. On the property, at the time of the filing of the special exception for the telecommunications facility, was a previously granted special exception existing for a private club. The Court of Special Appeals held that the minimum lot size requirements did not require a minimum of two acres for each proposed special exception and that the lot size requirements were not cumulative. (See pages 12-13 of *O'Flinn* slip opinion).

The Board finds that *O'Flinn* is not dispositive of the present action. The specific issue of whether a minimum of two acres in an RE-2 zone is required for a telecommunications facility was not before the Court in *O'Flinn*.

The issue presented to this Board is one of statutory interpretation. It is proper for the Board to consider such issues. *Montgomery County v. Broadcast Equities, Inc.*, 360 Md. 438, 451, 758 A.2d 995, 1002 (2000). The rules relating to statutory interpretation are restated in *County Council v. Dutcher*, 365 Md. 399, 780 A.2d 1137, 1147 (2001) citing *Chesapeake & Potomac Telephone Co. of Md. v. Director of Finance*, 343 Md. 567, 578-79, 683 A.2d 512, 517-18 (1996) (citations omitted):

Of course the cardinal rule is to ascertain and effectuate legislative intent. To this end we begin our inquiry with the words of the statute and, ordinarily, when the words of the statute are clear and unambiguous, according to their commonly understood meaning, we end our inquiry there also. Where the statutory language is plain and unambiguous, a court may neither add nor delete language so as to "reflect an intent not evidenced in that language," *Condon v. State*, 332 Md. 481, 491, 632 A.2d 753, 755 (1993), nor may it construe the statute with "forced or subtle interpretations" that limit or extend its application. *Id* (citation omitted) Moreover, whenever possible, a statute should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory. (emphasis added)

The Board finds that Section 59-A02.43(j)(1) is "clear and unambiguous." The Board further finds that to give meaning to the language in Section 59-G-2.43(j)(1), requiring "not less than the lot area required in the zone," and so as to not render that clause "superfluous or nugatory," that section must be read to require a minimum lot area of two acres.

## BURROWS' LETTER

Petitioner also argues that a letter provided by the Burrows and entered into the record on December 5, 2001, (Exhibit 54(b)) is sufficient to allow the Burrows' entire 25.04 acre tract to be considered as the property "subject to" the special exception. The Board finds, however, that the letter does not provide the petitioner with sufficient rights to prosecute the action before the Board relative to the entire 25.04 acre parcel.

Section 59-A-4.22 directs those filing a petition for a special exception that certain data must accompany the petition. That section states, in pertinent part, as follows:

(a) Each petition for special exception must be accompanied at the time of its filing by 4 copies of a statement that includes:

• • • •

(6) If the petitioner is not the owner of the property involved, the lease, rental agreement, or contract to purchase by which petitioner's legal right to prosecute the petition is established.

In this action, the petitioner is not the owner of the entire 25.04 acres of the "property involved." (The 50 foot by 50 foot leased portion of the property itself would not meet the setback requirements identified in the Code, however, it is relied on by the petitioner to meet the relevant setbacks.) Therefore, it is incumbent upon petitioner to submit the required documentation establishing its legal right to prosecute the action. The Code specifies the nature of the documentation that is required. That documentation must be either (1) a lease, (2) a rental agreement, or (3) a contract to purchase. There are no other documents specified, nor is there a general clause which permits other or similar documents that might satisfy this requirement. Each of these three types of the agreements involve the transfer of certain rights. In a lease or rental agreement, the petitioner is transferred the right to use a particular property for a specific terms of years. These rights are enforceable by the courts of this state so long as the petitioner meets requirements of the lease or rental agreement. In a contract to purchase, equitable title has passed to the petitioner and the passage of legal title is pending. See, *Himminghoefer v. Medallion Industries, Inc.*, 302 Md. 270, 487 A.2d 282 (1985).

The letter placed into evidence by petitioner from the Burrows does not rise to the level of the transfer of rights that Code Section A-4.22(a)(6) contemplates. It appears to do no more than acknowledge the Burrows' support for the special exception by Mr. Donohue "on behalf of his client." As such, it

does not meet the requirements of the Zoning Ordinance and is insufficient to allow the petitioner to proceed in this action.

### PREVIOUSLY GRANTED SPECIAL EXCEPTIONS

Finally, petitioner argues that this Board has granted as many as 25 other special exceptions for telecommunications facilities on similar facts, 16 of which have followed the 1996 adoption of the last major zoning text amendment relating to telecommunications facilities. Assuming, for purposes of argument, that this is true, the Board observes that it has never squarely addressed the issue. The People's Counsel argues that since this issue has never been raised the Board is not prohibited from fully considering this issue now that it has been presented. The Board agrees with People's Counsel.

The law is clear that an agency must either follow its own precedents or explain why it departs from them. *Atchison, T. & S. F. R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973). In *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir.) *cert. denied*, 403 U.S. 923 (1971) the court observed that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ."

As stated previously, this is a case of first impression. However, assuming, arguendo, that the Board is changing a prior policy, it now finds, in this and future cases, that under Section 59-G-2.43(j)(1), a telecommunications facility may only be built on a lot or parcel that meets the minimum requirements of the zone. The Board concludes that, given the size and height of the structures involved, that basic compatibility analysis, as a required finding in Section 59-G-1.21, mandates a larger lot size than petitioner's proposed 2,500 square foot area. Given the relative height of this type of structure (130 feet in this case), the Board believes that in order to be harmonious with the residential character of a neighborhood, a finding is required under Section 59-G-1.21(a)(4) that such a facility must, at a minimum, meet the lot size required for a single family residence in the neighborhood.

The Board also observes that, even if prior panels of the Board had failed to require that the minimum lot size apply to this facility, that such a finding is contrary to the plain meaning of Section 59-G-2.43(j)(1). As stated in *County Council v. Dutcher*, *supra*, quoting *Smith v. Higinbotham*, 187 Md. 115, 132-133, 48 A.2d 54, 763 (1946): "Indeed, we have long held that '[n]o custom, however long and generally it has been followed by officials of the State, can nullify the plain meaning and purpose of a statute.'" 780 A.2d at 1154. This holding is in accord with our finding above that the language of the Zoning Ordinance is "clear and unambiguous."

The Board observes that it is not unusual for the Zoning Ordinance to specify a minimum lot area for a special exception. Examples include Section 59-G-2.31 Hospitals (minimum area five acres); Section 59-G-2.25.1 Grain elevator (5 acres); Section 59-G-2.23 Funeral Parlors or Undertaking Establishments (1 ½ acres); Section 59-G-2.21.3 Farm Supply (2 acres); and Section 59-G-2.14 Clinic (40,000 square feet). The only difference between these special exceptions and the one at issue is that the allowable minimum lot area changes to meet that of the underlying zone.

Based upon the foregoing, the Board finds that petitioner's proposal fails to meet the requirement that it must be on a lot or parcel large enough to meet the applicable minimum parcel or lot area of two acres required in the RE-2 Zone.

On a motion by Allison I. Fultz, seconded by Donna L. Barron, with Chairman Donald H. Spence, Jr., Louise L. Mayer and Angelo M. Caputo in agreement, the Board adopted the following Resolution:

BE IT RESOLVED, by the Board of Appeals for Montgomery County, Maryland, that upon Reconsideration, the Resolution dismissing the Petition of AT&T Wireless Services in Case No. S-2447, is reaffirmed and Case No. S-2447 is **dismissed**, as legally deficient.

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Donald H. Spence, Jr.  
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 23<sup>rd</sup> day of January, 2002.

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Katherine Freeman  
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Bard's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

